

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS (BOSTON)

LUIS RIVERA,

PETITIONER,

V.

DAVID NOLAN, SUPERINTENDENT,

RESPONDENT

C.A. NO: 04-12717-RCL

PETITIONER'S MOTION FOR LEAVE  
TO APPEAL IN FORMA PAUPERIS

Now comes the Petitioner, Luis Rivera, pro-se in the above entitled action, and respectfully moves pursuant to Fed.R.App.P. 24 that this Honorable Court allow him Leave to Appeal In Forma Pauperis.

As reasons for the instant request, Petitioner respectfully submits the following for this Court's consideration:

1.) Petitioner has filed a timely Notice of Appeal from this Court's denial of his 28 USC § 2254 Petition for Writ of Habeas Corpus (ORDER entered 6/17/05).

2.) Petitioner has sought a Certificate of Appealability from this Court pursuant to 28 USC §2253 (c) (2) and Local Rule 22.1, as well as at the direction of the U.S. Court of Appeals September 28,2005 ORDER, which this Court denied on October 28,2005.

3.) Petitioner has been directed by ORDER of the U.S. Court of Appeals (entered November 15,2005) to submit the within Motion to this Court (with applicable attachments, i.e. Form 4 and Certified Prison Account Statement) by December 5,2005.

**RIVERA v. NOLAN, C.A. No:04-12717-RCL**

Petitioner's Motion For Leave To Appeal In Forma Pauperis

Page 2 of 2 pages

4.) Petitioner is Indigent and unable to pay the required \$255.00 docketing fees.

5.) Petitioner respectfully submits that he has meritorious grounds for appellate review (as briefly stated in the attached Affidavit filed herewith).

WHEREFORE, for the reasons stated above and in the interests of justice, Petitioner prays that this Honorable Court will allow the instant Motion.

Respectfully submitted by:

A handwritten signature in cursive script, appearing to read "Luis F. Rivera", is written over a horizontal line.

Luis F. Rivera, pro-se  
MCI-Norfolk  
2 Clark Street, P.O. Box 43  
Norfolk, MA 02056-0043

Dated: November 22, 2005

# **Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis**

**District Court No.** 04-cv-12717-RCL  
**Appeal No.** 05-2418

LUIS RIVERA (Petitioner/Appellant)

v.

DAVID NOLAN, SUPERINTENDENT (Respondent/Appellee)

## **Affidavit in Support of Motion**

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: Luis R. Rivera

## **Instructions**

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: 11-22-05

**My issues on appeal are:**

(Please see Attachment)

*1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Prison employment				
Employment (above)	\$ 100.00 approx	\$ N/A	\$ N/A	\$ N/A
Self-employment	\$ N/A	\$ N/A	\$ N/A	\$ N/A
Income from real property (such as rental income)	\$ N/A	\$ N/A	\$ N/A	\$ N/A
Interest and dividends	\$ N/A	\$ N/A	\$ N/A	\$ N/A

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Gifts (family/friends)	\$ 240.00 aprox.	\$ N/A	\$ N/A	\$ N/A
Alimony	\$ N/A	\$ N/A	\$ N/A	\$ N/A
Child support	\$ N/A	\$ N/A	\$ N/A	\$ N/A
Retirement (such as social security, pensions, annuities, insurance)	\$ N/A	\$ N/A	\$ N/A	\$ N/A
Disability (such as social security, insurance payments)	\$ N/A	\$ N/A	\$ N/A	\$ N/A
Unemployment payments	\$ N/A	\$ N/A	\$ N/A	\$ N/A
Public-assistance (such as welfare)	\$ N/A	\$ N/A	\$ N/A	\$ N/A
Other (specify): N/A	\$ N/A	\$ N/A	\$ N/A	\$ N/A
Total Monthly income:	\$ 60-70.00 every 3 months approx.	\$ N/A	\$ N/A	\$ N/A

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions)

Employer	Address	Dates of Employment	Gross monthly pay
MCI-Cedar Junction	P.O. Box 100 S.Walpole MA 02071	1-1-05 to 6-1-05	\$40.00 aprox.
_____	_____	_____	_____
_____	_____	_____	_____

3. List your spouses's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	N/A
_____	_____	_____	_____
_____	_____	_____	_____

4. How much cash do you and your spouse have? \$ -0-

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of Account	Amount you have	Amount your spouse has
MCI-Norfolk	prison	\$ 19.82	\$ N/A
		\$	\$
		\$	\$

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	(Value)	Other real estate	(Value)	Motor Vehicle #1	(Value)
N/A		N/A		Make & year: N/A	
N/A		N/A		Model: N/A	
N/A		N/A		Registration#: N/A	
Motor Vehicle #2	(Value)	Other assets	(Value)	Other assets	(Value)
Make & year: N/A		N/A		N/A	
Model: N/A		N/A		N/A	
Registration#: N/A		N/A		N/A	

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A	N/A	N/A
N/A	N/A	N/A
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Spouse
Rent or home mortgage payment (include lot rented for mobile home)	\$ <u>N/A</u>	\$ <u>N/A</u>
Are any real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No	N/A	
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No	N/A	
Utilities (electricity, heating fuel, water, sewer, and Telephone)	\$ <u>N/A</u>	\$ <u>N/A</u>
Home maintenance (repairs and upkeep)	\$ <u>N/A</u>	\$ <u>N/A</u>
Food	\$ <u>N/A</u>	\$ <u>N/A</u>
Clothing	\$ <u>N/A</u>	\$ <u>N/A</u>
Laundry and dry-cleaning	\$ <u>N/A</u>	\$ <u>N/A</u>
Medical and dental expenses	\$ <u>N/A</u>	\$ <u>N/A</u>
Transportation (not including motor vehicle payments)	\$ <u>N/A</u>	\$ <u>N/A</u>
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>N/A</u>	\$ <u>N/A</u>
Insurance (not deducted from wages or included in Mortgage payments)	\$ <u>N/A</u>	\$ <u>N/A</u>
Homeowner's or renter's	\$ <u>N/A</u>	\$ <u>N/A</u>
Life	\$ <u>N/A</u>	\$ <u>N/A</u>
Health	\$ <u>N/A</u>	\$ <u>N/A</u>
Motor Vehicle	\$ <u>N/A</u>	\$ <u>N/A</u>
Other: <u>hygiene items not supplied by DOC</u>	\$ <u>60.00 approx.</u>	\$ <u>N/A</u>
Taxes (not deducted from wages or included in Mortgage payments)(specify): <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Installment payments	\$ <u>N/A</u>	\$ <u>N/A</u>
Motor Vehicle	\$ <u>N/A</u>	\$ <u>N/A</u>
Credit card (name): <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Department store (name): <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
Other: <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>

Alimony, maintenance, and support paid to others	\$ <u>N/A</u>	\$ <u>N/A</u>
Regular expenses for operations of business, profession, or farm (attach detailed statement)	\$ <u>N/A</u>	\$ <u>N/A</u>
Other (specify): <u>N/A</u>	\$ <u>N/A</u>	\$ <u>N/A</u>
<b>Total monthly expenses:</b>	\$ <u>60.00 aprox.</u>	\$ <u>N/A</u>

9. Do you expect any major changes to your monthly income or expenses in your assets or liabilities during the next 12 months?

☐ Yes ☒ No

If yes, describe on an attached sheet.

10. Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? \$ N/A

If yes, state the attorney's name, address, and telephone number:

N/A

11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? \$ N/A

If yes, state the person's name, address, and telephone number:

N/A

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

Incarcerated for life

*13.State the address of your legal residence.*

MCI-Norfolk 2 Clark St., P.O. Box 43 Norfolk, MA 02056-0043

\_\_\_\_\_  
Your daytime phone number: (\_\_\_\_) \_\_\_\_ N/A

Your age: 36 Your years of schooling: 12 (G.E.D.)



Attachment to Affidavit To Accompany Motion For Leave To Appeal In Forma Pauperis

RIVERA v. NOLAN

District Court No: 04-cv-12717-RCL



Appeals Court No: 04-2418

My issues on appeal are:

- 1.) Ineffective assistance of appellate counsel by omission of meritorious appellate grounds on direct appeal;
- 2.) Conviction unlawfully obtained due to two related misstatements of proof beyond a reasonable doubt in prosecutor's closing argument and jury instructions;
- 3.) Ineffective assistance of trial counsel for failure to object and failure to call necessary witnesses for defense;
- 4.) Conviction unlawfully obtained by prosecutor's knowing and deliberate presentation of false testimony and concealment of exculpatory evidence

MASSACHUSETTS  
DEPARTMENT OF CORRECTION  
Inmate Transaction History  
Summary Report

MCI NORFOLK

Inmate Name..... RIVERA LUIS  
Commitment number.... W52832  
Period encompassed.... 5/1/2005 THRU 11/1/2005

	Personal	Savings	Total
Six Month Average Daily Balance	<u>32.78</u>	<u>13.23</u>	<u>46.01</u>
20% of Six Month Average Daily Balance	<u>9.20</u>		
Total Expenditures for Period			<u>263.21</u>
Total Income for Period			<u>212.10</u>

To the best of my knowledge, the above summary information is true and accurate:

Signed Marsha Collins  
MARSHA COLLINS, Treasurer

Time: 10:51 AM

Date: 11/18/05

Note: A copy of the inmate's account activity statement for the six month period ("Inmate Transaction History") is attached.

*Court*

## COMMONWEALTH OF MASSACHUSETTS

## DEPARTMENT OF CORRECTION

## Inmate Transaction Report

Date : 20051117 15:29

Page : 1

Commit# : W52832 MCI NORFOLK

Name : RIVERA, LUIS, JR., F. Statement From : 20050501

Inst : MCI NORFOLK To : 20051101

Block : 2-2

Cell/Bed : 107 /B

Transaction Date	Type	Receipt #	Check No	Inst Name	Notes	Personal		Savings	
						Income	Expense	Income	Expense
Total Transaction before this Period :						\$2,992.94	\$2,916.87	\$7.60	\$7.60
20050502 22:30	CN - Canteen	4536229		CJ	Canteen Date : 20050502	\$0.00	\$22.56	\$0.00	\$0.00
20050509 22:30	CN - Canteen	4573844		CJ	Canteen Date : 20050509	\$0.00	\$28.43	\$0.00	\$0.00
20050511 16:48	IS - Interest	4589064		CJ		\$0.14	\$0.00	\$0.00	\$0.00
20050519 10:14	PY - Payroll	4644454		CJ	20050501 To 20050507	\$14.00	\$0.00	\$0.00	\$0.00
20050519 10:14	PY - Payroll	4644455		CJ	20050501 To 20050507 -Corrected Payroll 20050410	\$14.00	\$0.00	\$0.00	\$0.00
20050519 10:14	PY - Payroll	4644456		CJ	20050501 To 20050507 -Corrected Payroll 20050417	\$14.00	\$0.00	\$0.00	\$0.00
20050519 10:14	PY - Payroll	4644457		CJ	20050501 To 20050507 -Corrected Payroll 20050424	\$14.00	\$0.00	\$0.00	\$0.00
20050519 13:55	TI - Transfer from Institution	4644779		CJ		\$0.00	\$81.22	\$0.00	\$0.00
20050519 13:55	TI - Transfer from Institution	4644780		NOR		\$81.22	\$0.00	\$0.00	\$0.00
20050525 23:15	PY - Payroll	4675050		CJ	20050508 To 20050514	\$7.00	\$0.00	\$0.00	\$0.00
20050525 23:15	TI - Transfer from Institution	4675051		CJ	Associate Receipt Number is 4675050	\$0.00	\$7.00	\$0.00	\$0.00
20050525 23:15	TI - Transfer from Institution	4675053		CJ	Associate Receipt Number is 4675050	\$0.00	\$0.00	\$0.00	\$7.00
20050525 23:15	TI - Transfer from Institution	4675052		NOR	Associate Receipt Number is 4675050	\$7.00	\$0.00	\$0.00	\$0.00
20050525 23:15	TI - Transfer from Institution	4675054		NOR	Associate Receipt Number is 4675050	\$0.00	\$0.00	\$7.00	\$0.00
20050525 23:15	PY - Payroll	4675055		CJ	20050508 To 20050514	\$0.00	\$0.00	\$7.00	\$0.00
20050526 22:30	CN - Canteen	4680618		NOR	Canteen Date : 20050526	\$0.00	\$35.60	\$0.00	\$0.00
20050601 23:10	PY - Payroll	4705259		CJ	20050515 To 20050521	\$5.00	\$0.00	\$0.00	\$0.00
20050601 23:10	TI - Transfer from Institution	4705262		CJ	Associate Receipt Number is 4705259	\$0.00	\$0.00	\$0.00	\$5.00
20050601 23:10	TI - Transfer from Institution	4705263		NOR	Associate Receipt Number is 4705259	\$0.00	\$0.00	\$5.00	\$0.00
20050601 23:10	PY - Payroll	4705264		CJ	20050515 To 20050521	\$0.00	\$0.00	\$5.00	\$0.00
20050601 23:10	TI - Transfer from Institution	4705260		CJ	Associate Receipt Number is 4705259	\$0.00	\$5.00	\$0.00	\$0.00
20050601 23:10	TI - Transfer from Institution	4705261		NOR	Associate Receipt Number is 4705259	\$5.00	\$0.00	\$0.00	\$0.00
20050608 23:11	PY - Payroll	4743582		CJ	20050522 To 20050528	\$5.00	\$0.00	\$0.00	\$0.00
20050608 23:11	PY - Payroll	4743587		CJ	20050522 To 20050528	\$0.00	\$0.00	\$5.00	\$0.00
20050608 23:11	TI - Transfer from Institution	4743586		NOR	Associate Receipt Number is 4743582	\$0.00	\$0.00	\$5.00	\$0.00
20050608 23:11	TI - Transfer from Institution	4743585		CJ	Associate Receipt Number is 4743582	\$0.00	\$0.00	\$0.00	\$5.00
20050608 23:11	TI - Transfer from Institution	4743583		CJ	Associate Receipt Number is 4743582	\$0.00	\$5.00	\$0.00	\$0.00
20050608 23:11	TI - Transfer from Institution	4743584		NOR	Associate Receipt Number is 4743582	\$5.00	\$0.00	\$0.00	\$0.00
20050609 16:49	IS - Interest	4750917		NOR		\$0.19	\$0.00	\$0.00	\$0.00
20050609 16:49	IS - Interest	4750918		NOR		\$0.00	\$0.00	\$0.00	\$0.00

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF CORRECTION  
Inmate Transaction Report**

Date : 20051117 15:29

Page 2

Commit# : W52832 MCI NORFOLK

Name : RIVERA, LUIS, JR., F. Statement From 20050501

Inst : MCI NORFOLK To 20051101

Block : 2-2

Cell/Bed : 107 /B

Transaction Date	Type	Receipt #	Check No	Inst Name	Notes	Personal		Savings	
						Income	Expense	Income	Expense
20050620 09:41	ML - Mail	4804241		NOR	RAYMOND & NIDEA RIOS	\$60.00	\$0.00	\$0.00	\$0.00
20050620 09:41	MA - Maintenance and Administration	4804243		NOR	Monthly Maintenance and Administration Fee	\$0.00	\$1.00	\$0.00	\$0.00
20050622 13:13	IC - Transfer from Inmate to Club A/c	4816261		NOR	JULIE DANIELE/ UPS PROPERTY SHIPPING CHARGE - Z49 PROPERTY SHIPPING CHARGE - Z49	\$0.00	\$6.00	\$0.00	\$0.00
20050622 13:14	IC - Transfer from Inmate to Club A/c	4816268		NOR	JOHN ADAM COURTHOUSE PROPERTY SHIPPING CHARGE - Z49 PROPERTY SHIPPING CHARGE - Z49	\$0.00	\$6.00	\$0.00	\$0.00
20050623 22:30	CN - Canteen	4831586		NOR	Canteen Date: 20050623	\$0.00	\$39.95	\$0.00	\$0.00
20050711 14:00	IC - Transfer from Inmate to Club A/c	4909588		NOR	U.S District Court POSTAGE - Z11-POSTAGE - Z11	\$0.00	\$5.06	\$0.00	\$0.00
20050711 14:01	IC - Transfer from Inmate to Club A/c	4909598		NOR	U.S District Court POSTAGE - Z11-POSTAGE - Z11	\$0.00	\$5.06	\$0.00	\$0.00
20050713 16:51	IS - Interest	4926257		NOR		\$0.25	\$0.00	\$0.00	\$0.00
20050713 16:51	IS - Interest	4926258		NOR		\$0.00	\$0.00	\$0.05	\$0.00
20050714 22:30	CN - Canteen	4949666		NOR	Canteen Date: 20050714	\$0.00	\$34.38	\$0.00	\$0.00
20050721 22:30	CN - Canteen	4982115		NOR	Canteen Date: 20050721	\$0.00	\$25.41	\$0.00	\$0.00
20050803 16:51	IS - Interest	5041158		NOR		\$0.13	\$0.00	\$0.00	\$0.00
20050803 16:51	IS - Interest	5041159		NOR		\$0.00	\$0.00	\$0.06	\$0.00
20050909 17:12	IS - Interest	5248873		NOR		\$0.00	\$0.00	\$0.00	\$0.00
20050909 17:12	IS - Interest	5248874		NOR		\$0.00	\$0.00	\$0.07	\$0.00
20050916 12:42	ML - Mail	5294777	153	NOR	NIDEA RIOS	\$75.00	\$0.00	\$0.00	\$0.00
20050916 12:42	MA - Maintenance and Administration	5294780		NOR	Monthly Maintenance and Administration Fee	\$0.00	\$1.00	\$0.00	\$0.00
20050929 22:30	CN - Canteen	5357497		NOR	Canteen Date: 20050929	\$0.00	\$47.07	\$0.00	\$0.00
20050930 11:43	IC - Transfer from Inmate to Club A/c	5359419		NOR	MALIK AL-SHABAZZ MUSLIM CENTER - Z89 MALIK AL-SHABAZZ MUSLIM CENTER - Z89	\$0.00	\$5.00	\$0.00	\$0.00
20051006 22:30	CN - Canteen	5395858		NOR	Canteen Date: 20051006	\$0.00	\$14.69	\$0.00	\$0.00
20051013 16:50	IS - Interest	5432139		NOR		\$0.14	\$0.00	\$0.00	\$0.00
20051013 16:50	IS - Interest	5432140		NOR		\$0.00	\$0.00	\$0.07	\$0.00
						\$307.07	\$375.43	\$34.25	\$17.00
Balance as of ending date :							Personal \$7.71	Savings \$17.25	

## COMMONWEALTH OF MASSACHUSETTS

## DEPARTMENT OF CORRECTION

## Inmate Transaction Report

Date : 20051117 15:29

Page 3

Commit# :	W52832	MCI NORFOLK
Name :	RIVERA, LUIS, JR., E.	Statement From 20050501
Inst :	MCI NORFOLK	To 20051101
Block :	2-2	
Cell/Bed :	107 /B	

## Current Balances :

Personal	Savings	Freeze	Loan	Restitution	Sentence
\$10.25	\$19.82	\$0.00	\$0.00	\$0.00	\$0.00

CERTIFICATE OF SERVICE

I, Luis F. Rivera, pro-se Petitioner in the matter of **RIVERA v. NOLAN**, U.S. District Court No: 04-12717-RCL, do hereby certify that a true and accurate copy of Petitioner's Motion For Leave To Appeal In Forma Pauperis, and Affidavit To Accompany Motion For Leave To Appeal In Forma Pauperis (w/attachments), has been served upon Maura D. McLaughlin, Assistant Attorney General at the Office of the Attorney General, One Ashburton Place, 18<sup>th</sup> Floor, Boston, Massachusetts 02108, by mailing same, 1<sup>st</sup> Class U.S. postage, prepaid on this 22<sup>nd</sup> day of November 2005.

Signed under the pains and penalties of perjury:

Luis F. Rivera 2

Luis F. Rivera  
(Petitioner)